IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 862 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MITESHKUMAR RAMESHBHAI PATEL & ANR

Versus

STATE OF GUJARAT & ANR

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Appearance :

MR ASIN PANDYA FOR HL PATEL ADVOCATES for Applicants

MR KC SHAH APP for Respondent No.1

MR MA BUKHARI for Respondent No.2

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

Date : 23/02/2006

ORAL JUDGMENT

1. At the admission stage, since submissions made at length, the matter was heard finally and learned counsels also agreed for final hearing of the matter.

2. Learned advocate Mr.Asin Pandya for the applicants, learned APP Mr.K.C.Shah for the respondent No.1 – State of Gujarat and learned advocate Mr.M.A.Bukhari for the respondent No.2 – Shri Ismail U. Vohra, were heard at length.

3. The present applicants are amongst the accused of Sessions Case No.199 of 2003 pending before the Court of Sessions i.e. Fast Track Court Judge, at Anand, while respondent No.1 is the State and the respondent No.2 herein is the witness of the said trial and filed an application at Ex.245 on 01.03.2005. It was contended by such application that the

investigation was biased in favour of the accused and was defective and hence re-investigation was necessary. It was stated that the persons affected in the incident were robbed of their valuables as well as cash amount, but the said muddamal has not been attempted to be recovered in the said investigation. It was also contended that the Investigating Agency in formal manner inquired from the witnesses and no careful inquiry was made. It was also contended that the statements of witnesses were not recorded as per the say of a particular witness. The investigating agency failed to assess the damage done at the spot. It was alleged that the accused were trying to fabricate false evidence. If, the trial is allowed to proceed further, it would be in the benefit and only in the benefit of the accused. It was also contended further that the witnesses have suffered mental as well as economic loss, even though they have sustained their morale. It was, therefore, urged that the

re-investigation in the crime was necessary.

4. After hearing all the concerned parties, the learned Additional Sessions Judge as well as Fast Track Court Judge, on 21.07.2005 decided application with a short observation that having considered the complaint, statements of the witnesses and investigating papers as well as evidence recorded during trial, it was in the interest of justice to order re-investigation. It was further directed that not only in respect of muddamal only, but investigating agency must report to other aspects which requires investigation.

5. The above said order passed by the learned trial Judge on 21.07.2005 is impugned in this Criminal Revision Application by the applicants – accused.

6. As per the further facts of the case, it appears that the incident in question is an aftermath of Godhra carnage and on 01.03.2002 at about 16.30 hours, a Masjid situated at Vasad was put on fire by a mob. The said mob of persons not only damaged the Masjid, but pelted stone etc. on informant as well as upon the witnesses. Many accused were charge-sheeted in respect of this crime registered before Vasad Police Station vide C.R.No.I-49/2002. The complainant i.e. informant was a constable Harising Noparam Jaat of S.R.P., Group No.10, Company No.D. After investigation, it appears that charge-sheet came to be filed against many accused and learned trial Judge framed the charge against 53 accused on 16.06.2004 for the offences punishable under Sections 147, 148, 149, 436, 332,337, 153(3), 454, 457 and 380 of the Indian Penal Code and under Section 135 of the Bombay Police Act, 1951. The trial was proceeded with, it has been submitted at Bar that out of 96 witnesses cited

in the charge-sheet, 85 witnesses have been examined and at that stage an application Ex.245 came to be filed by the present respondent No.2.

7. Learned advocate Mr.Asin Pandya for the applicants submits that having regard to the stage reached by the trial, it appears that the re-investigation, as directed, would be in violation of double jeopardy principle enunciated in the Constitution of India, because the accused will have to face altogether a new case which is not permissible under the law. Contending further, it was also submitted that in any case, law would not permit re-investigation. It was contended that in certain circumstances, as envisaged by Section 173(8) of the Code of Criminal Procedure, further investigation may take place, but not re-investigation in the spirit and terms of the direction issued by the trial Judge in the order impugned. Learned advocate for the applicants relying upon the

decision of the Apex Court in the matter of **K. CHANDRASEKHAR Vs. STATE OF KERALA AND OTHERS**, as reported in **AIR 1998 S.C. 2001,** contended that literal reading of the provision of Section 173(8) of the Code of Criminal Procedure in unequivocal terms discloses that it does not authorize Magistrate or the Court concerned to direct re-investigation, but the provision enables the investigating agency to further investigate. It is submitted that it is nowhere laid down in the Code that the Magistrate is empowered to order further investigation or reinvestigation within the scope of Section 173(8) of the Code of Criminal Procedure. Then, it is contended that the order impugned is non-speaking order, as almost no reasons are assigned for passing of the order. It is submitted that when such non-speaking orders are passed and are subjected to scrutiny of higher forum, it becomes very difficult to assess that how the Court below reached to the conclusion. It is submitted that

the order impugned is required to be quashed on this ground alone. With reference to this contention, learned advocate agitated that the impugned order is not sustainable even on merits, as well. It was submitted that the investigation is carried out and charge-sheet is filed, the accused are facing the trial. Now at this juncture, there is nothing on the record to deduct that the investigation was faulty and defective on certain aspects. It is, therefore, submitted that the learned trial Judge though referred to investigation papers, but could not point out any defects in investigation so as to direct reinvestigation. It is contended that therefore, the order impugned is unreasoned order and not sustainable. The learned advocate for the applicant raised contention about the merits of the order passed by the learned trial Judge by going through the investigation papers. Lastly, it was submitted that in all cases, it is required to be taken into account effects of

passing of the orders and non-passing of the orders. It was submitted that almost 85 witnesses, out of 96, have already been examined and the trial is at the verge of completion. It is submitted that if, re-investigation is permitted, as directed by the learned trial Judge, the same shall affect adversely to the accused. It was contended that on account of this, the trial is certainly going to be delayed to a greater extent. It is submitted that these circumstances if viewed with the fundamental right of the accused of speedy trial, the order impugned requires to be quashed. It is submitted that the application, therefore, filed by the respondent No.2 is frivolous and filed at very belated stage with only purpose of delaying the trial and to put the accused in greater hardship. Learned advocate contended that for the above said reasons, this Criminal Revision Application is required to be allowed and the order impugned be set aside.

8. Learned APP Mr.K.C.Shah for the respondent No.1 – State of Gujarat contended that while an application is filed by a witness of a trial may be at any stage and may be in any nature, but all circumstances including motive behind filing of an application must receive due consideration. It is submitted that in application itself, it is stated by the applicants that the witness suffered mental as well as the financial damage. Learned APP submitted that therefore, motive behind moving this application by the witness is obvious. It is submitted by the learned APP that the scheme of Code of Criminal Procedure as well as in pursuance of the criminal jurisprudence of this country, prosecution always comes before the Court with a definite case and version against the accused. The Courts are empowered to punish the accused against whom such definite version is proved. It is beyond the scheme of the Code and Criminal Justice System that the accused be attempted to punish for any probable version

deviating from definite version which prosecution comes before the Court. It was submitted that in any case, it is not the criminal law of the country that by altering the original investigation and amending the definite case of the prosecution, accused can be pushed to face the new case. It is submitted that therefore, while no re-investigation is permitted by the Court, only further investigation under Section 173(8) of the Code of Criminal Procedure is made permissible and it is obvious by the scheme of the Code that Section 173(8) is exceptional in nature, must operate within very limited scope. It is submitted that within the definite version of the prosecution which is brought to the Court, if any Court is satisfied that any person was liable to answer the prosecution case, the proper provision is made vide Section 319 of the Code of Criminal Procedure. It is submitted that once the First Information Report is lodged, investigation starts in accordance with the said

F.I.R., if that is not done, other remedies might be available to the aggrieved persons. It is submitted that despite the above clear concept of law, how a witness of a trial can substantively appreciate the circumstances of the investigation and come to a conclusion that the investigation was defective. It is submitted that virtually in this case, the witnesses of the trial appreciated the investigation and came to the conclusion that the investigation is defective and is biased on certain aspects and that appreciation of a witness has been affirmed by the trial Court and invoked the powers under Section 173(8) of the Code of Criminal Procedure. In such a situation, it was submitted that before invoking powers, the trial Court ought to have taken into account all those essential elements of the matter.

9. Learned advocate Mr.M.A.Bukhari for the respondent No.2, vehemently supporting the order impugned, submitted that this is a fit case in

which reinvestigation or further investigation whatsoever be sought, was absolutely necessitated as noticed by the learned trial Judge. My attention was drawn to two applications placed on record of the trial. Learned advocate for the respondent No.2 submitted that vide application Ex.255 which is a report from the investigating agency, it was pointed out by the trial Court that in certain respect re-investigation in the matter was necessary and, therefore, the papers submitted before the trial Court were required to be returned to investigating agency. The investigating agency described in the said report the aspect of the reinvestigation which was necessary. Learned advocate for the respondent No.2 drawn attention of the Court towards the order passed below this application that ultimately Ex.255 came to be withdrawn by a concerned learned APP in-charge of the case. It was, then, contended that the present respondent No.2, thereafter, preferred an application at

Ex.267 invoking powers of the trial Judge to direct the investigating agency to observe certain recognized guidelines, while investigating or re-investigating the crime. My attention was drawn to the order passed below that application. The learned trial Judge disposed of the said application stating that in view of the order passed below Ex.245 (order impugned in this Criminal Revision Application), the said application stood disposed of. Learned advocate for the respondent No.2, therefore, submitted that this situation compelled the respondent No.2 herein being a witness to prefer an application at Ex.245 to re-investigate the crime. It is submitted that all particulars which are necessary, are mentioned in the application. My attention was drawn to paras-2 and 3 of the application, wherein the defects and short coming of the investigation was brought out along with reasons for re-investigation of the crime. It was submitted that therefore, it cannot be said that

the application itself is not explanatory. It was submitted that likewise, there is no substance in the contention that the order passed by the trial Judge, is not a speaking order. It was submitted that though the order passed is short one, but sufficiently reasoned. My attention, at this juncture, was drawn to the order passed and it was contended that the trial Judge did care to go through the papers of the investigation, statements recorded, first information report filed as well as the evidence recorded during the trial. It is submitted that going through all the papers, the trial Judge came to the conclusion that the case was fit one to direct re-investigation. Learned advocate for the respondent No.2 submitted that in no circumstances, it could be said that the order impugned, is not sustainable because the same is without any reasons. It is submitted that the Court concerned was within its power to direct further investigation at any stage of trial to

which the facts like delay of trial, hardship to the accused are irrelevant factors. Learned advocate for the respondent No.2 placed reliance on a decision of the Apex Court in the matter of **HASANBHAI VALIBHAI QURESHI Vs. STATE OF GUJARAT AND ORS.**, as reported in **2004 (2) Crimes 145 (S.C.)**, wherein the Apex Court observed that the factor of delay of trial must not deter the hands of the investigating agency or the Courts where further investigation is, according to law, necessity. Learned advocate for the respondent No.2 submitted that the order in question is perfectly legal and reasoned order and should not be interfered with in the revisional jurisdiction as the High Court should be slow in setting aside the proper orders of the trial Court in revisional jurisdiction, as aforesaid.

10. Having heard learned counsels at length and having gone through the record of the case, available with this Court, undisputed position is

stage of trial. There is no dispute that against 53 persons including the present applicants, the above said charge-sheet was filed, charge was framed and trial culminated to the extent of examining 85 witnesses out of 96 witnesses, cited in the charge-sheet and at that juncture, an application Ex.245 for re-investigation came to be submitted, as aforesaid.

11. It appears that there is some confusion about the re-investigation and further investigation. What is empowered by Section 173(8) of the Code of Criminal Procedure is further investigation and not re-investigation. This is amply made clear by the Apex Court in a decision, in the matter of **K. CHANDRASEKHAR Vs. STATE OF KERALA AND OTHERS** (Supra). It has been observed by the Apex Court in para-25 as under:-

> **"25.** From a plain reading of the above Section it is evident that even after

submission of police report under sub-section (2) on completion of investigation, the police has a right of “further” investigation, under sub-section (8) but not “fresh investigation” or “re-investigation”. That the Government of Kerala was also conscious of this position is evident from the fact that though initially it stated in the Explanatory Note of their notification dated June, 27, 1996 (quoted earlier) that the consent was being withdrawn in public interest to order a “reinvestigation”, of the case by a special team of State police officers, in the amendatory notification (quoted earlier) it made it clear that they wanted a “further investigation of the case”, instead of “re-investigation of the case”. The dictionary meaning of “further” (when used as an adjective) is

"additional", more supplemental. "Further" investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a "further" report or reports – and not fresh report or reports – regarding the "further" evidence obtained during such investigation. Once it is accepted – and it has got to be accepted in view of the judgment in Kazi Lhendup Dorji, (1994 AIR SCW 2190) (supra) that an investigation undertaken by CBI pursuant

to a consent granted under Section 6 of the Act is to be completed, notwithstanding withdrawal of the consent, and that “further investigation” is a continuation of such investigation which culminates in a further police report under sub-section (8) of Section 173, it necessarily means that withdrawal of consent in the instant case would not entitle the State police, to further investigate into the case. To put it differently, if any further investigation is to be made it is the C.B.I. alone which can do so, for it was entrusted to investigate into the case by the State Government. Resultantly, the notification issued withdrawing the consent to enable the State Police to further investigate into the case is patently invalid and unsustainable in law. In view of this

finding of ours we need not go into the questions, whether Section 21 of the General Clauses Act applies to the consent given under Section 6 of the Act and whether consent given for investigating into Crime No.246/94 was redundant in view of the general consent earlier given by the State of Kerala."

12. It is necessary to state the factual background of the case before the Apex Court. The State Government had consented for entrustment of investigation in a case involving offences punishable under official Secrets Act to the CBI. CBI completed investigation and filed a final report. Subsequently, the State Government withdrew the consent and sought further investigation in the case by the State Police. In those backdrops, the Apex court held as above.

13. True it is that in the application at Ex.245 and the order passed by the learned trial Judge which is impugned, the phraseology used is “reinvestigation”. Any how, reinvestigation is not permissible as observed by the Apex Court in decision mentioned above. Now without dwelling further upon this issue, assuming that trial Court meant further investigation and when it is not directed that the earlier investigation made in the case is to be wiped out *ab-initio*, without being guided by the phraseology used as re-investigation, it may be considered that in fact, re-investigation referred to is *de facto* a further investigation.

14. Now the matter in controversy is to examine the order impugned within the revisional jurisdiction of this Court. Various contentions, as aforesaid, are raised on diverse aspects. In sum and substance, pivot of the matter is whether learned trial Judge could have passed order for

further investigation as has been done in this case.

15. Section 173(8) of the Code of Criminal Procedure authorises amply to the investigating agency to investigate further in a crime. Placement of this provision at the bottom of Section 173 denotes that even after filing of the final report (charge-sheet) and during trial as well, the investigating agency is empowered to investigate further the crime and submit report in consonance with earlier provision of Section 173 and if such report is produced to concerned Court, it would be obliged to take that into consideration. Noteworthy it is here to refer to a decision of the Apex Court in the matter of **HASANBHAI VALIBHAI QURESHI Vs. STATE OF GUJARAT AND ORS**.(Supra) wherein the Apex Court, while examining the powers of investigating agency came to the conclusion that if a further investigation is warranted, the hands of the investigating

agency or the Court should not be tied down on the ground that further investigation may delay the trial, as ultimate object is to arrive at the truth. The Apex Court also observed that under Section 173(8) of the Code of Criminal Procedure, it is open to the police to conduct the proper investigation, even after the Court took cognizance of any offence on the strength of a police report earlier submitted. The Apex Court further observed that such powers of the police must not be tied down by the mere fact that there may be further delay in concluding the trial because if such further investigation would have helped the Court in arriving at the truth and do real and substantial as well as effective justice, such facts should not stand on the way of further investigation.

16. Thus, in above said decision, the Apex Court propounded that without being influenced by the fact that the charge-sheet is filed, and even if

the Court has taken cognizance and the trial has started, powers of police to investigate under Section 173(8) are unfettered, if such further investigation helps the Court to search the truth.

17. Thus it cannot be disputed that even after filing of the charge-sheet and taking cognizance by the Court, the police has ample power to investigate further the crime under Section 173(8) of the Code of Criminal Procedure. However, the controversy in the present matter is, not the powers of the police to further investigate under Section 173(8) of the Code of Criminal Procedure, but the controversy is whether the trial Court after taking cognizance and reaching to almost completion of the trial, can direct further investigation as envisaged by Section 173(8) of the Code of Criminal Procedure. Learned advocate for the respondent No.2 has supported the proposition of law that powers of

the Court under Section 173(8) of the Code of Criminal Procedure, which is competent to take cognizance, are unfettered and in a given case, the Court may direct police to investigate further even after taking cognizance and while conducting of the trial, if defects in the investigation are noticed. Before entertaining the merits of the case, whether on going through the investigating papers, this was a fit case for the trial Judge to order investigation under Section 173(8) of the Code of Criminal Procedure. It would be proper to examine, whether after taking cognizance, the Court has power to direct further investigation.

18. Section 173(8) of the Code of Criminal Procedure, is as under:

> “**173(8**) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report

under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).”

19. By virtue of Section 173 of the Code of Criminal Procedure, no powers are conferred upon the Court to direct further investigation. In this respect, two decision of this Court are brought to the notice of this Court and they are (1) In the matter of **SURENDRABHAI BABUBHAI PATEL Vs. STATE OF GUJARAT**, as reported in **1985 G.L.H.**

299; and (2) In the matter of **MAHENDRA P. DESAI Vs. THE STATE OF GUJARAT AND OTHERS**, as reported in **1985 G.L.H. 873.** In the matter of **SURENDRABHAI BABUBHAI PATEL Vs. STATE OF GUJARAT**, it is observed that by virtue of Section 173(8) of the Code of Criminal Procedure, the investigating officer is entitled to carry on further investigation with the permission of the Court, and there would be hardly any reason to hold that the Magistrate is not empowered to direct the investigating officer to make further investigation once he takes the cognizance. While in the matter of **MAHENDRA P. DESAI Vs. THE STATE OF GUJARAT AND OTHERS,** this Court observed that as observed by the Supreme Court in the case of ***Rishbud v. The State of Delhi, (1955) 1 SCR 1150***, further investigation is not altogether ruled out merely because cognizance of the case has been taken by the Court and further investigation can be ordered even after the charge-sheet is submitted.

20. Therefore, the question is after taking the cognizance and when the trial is reached to certain stage, whether Court can direct further investigation as envisaged by virtue of Section 173(8) of the Code of Criminal Procedure. It is absolutely necessary to refer here the decision of the Apex Court, in the matter of **RANDHIR SINGH RANA Vs. STATE (DELHI ADMINISTRATION)**, as reported in **1997 (1) SCC 361**, because the same issue was before the Apex Court which is at hand in this matter and while considering the provisions of Sections 156(3), 173(8), 190, 200 and 204 of the Code of Criminal Procedure, the Apex Court propounded in unequivocal terms that a Judicial Magistrate, after taking cognizance of an offence on the basis of police report and after appearance of the accused, cannot order of his own further investigation in the case. It was held in the said case that the order of the Magistrate directing further investigation was liable to be set aside with a direction to

dispose of the case either by framing the charge or discharge the accused on the basis of the material already on the record. Many decisions of the Apex Court came to be discussed by the Apex Court in this decision and ultimately it has been held that it is not within the power of the Court to order further investigation under Section 173(8) of the Code of Criminal Procedure, after taking cognizance upon the police report and when accused were appeared before the Court. While in this case, the learned Judge has not only taken cognizance upon the police report, but trial has reached to the stage of recording of deposition of 85 witnesses out of 96 witnesses and at that stage, at the instance of a witness, the Court has directed further investigation that too, under Section 173(8) of the Code of Criminal Procedure. It is noticed while going through the provision of Section 173(8) that such powers are not conferred upon the Courts. By virtue of Section 156 of the Code of Criminal Procedure and

the provisions thereafter before taking cognizance upon the police report, the Court is empowered to direct further investigation. However, once cognizance is taken and the trial is proceeded with, the Court is not empowered to alter the prosecution case by directing the further investigation. Therefore, by scheme of the Code, powers are vested in the Court, by virtue of Sections 319 and 311 of the Code of Criminal Procedure to the extent to call for any person to answer the prosecution case. The powers of the police to investigate further under Section 173(8) and power of the Court to direct further investigation at pre-cognizance stage must not be intermingling. The powers of the police under Section 173(8) to investigate further even when charge-sheet is filed and Court has taken cognizance are unfettered, but the Court, after taking cognizance cannot direct the police on its own to investigate further under Section 173(8) except such powers can be

exercised at pre-cognizance stage by Courts. In the present case, it appears that the order passed by the trial Court is without jurisdiction as aforesaid discussed by the Apex Court in the matter of *Randhir Singh Rana (Supra)*. Therefore, it becomes clear that the powers of the police to further investigate under Section 173(8), are unfettered and when trial is proceeding, police may inform concerned Court about further investigation, but no Court can direct such investigation under Section 173(8), after taking cognizance upon the police report.

21. This is the crux of the controversy which arises in this Criminal Revision Application and the confusion is created perhaps on account of intermingling the powers of the police to investigate further in a crime, by virtue of Section 173(8) of the Code of Criminal Procedure and the powers of the Court to direct such investigation and hence the trial Court probably

passed the order impugned.

22. In this view of the matter, this Criminal Revision Application deserves to be allowed and the order for which the grievance is made is required to be set aside and the application, ultimately, filed by respondent No.2 at Ex.245 stands rejected. Rule is made absolute to that extent. Absolutely necessary also to make it clear at this juncture that if any investigation is carried on by the police under Section 173(8) of the Code of Criminal Procedure in respect of the present crime independently of the order impugned in this revision, then the said investigation shall not at all be affected and influenced by the present order passed by this Court.

[J. R. VORA,J.]

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